

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL **75-6007**

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Petitioner-Appellee,

v.

FIRST NATIONAL CITY BANK,

Respondent-Appellant,

and

MILTON F. MEISSNER,

Proposed Intervenor-Appellant.

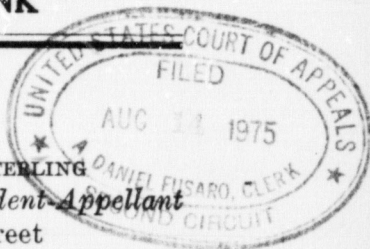
REPLY BRIEF OF RESPONDENT-APPELLANT
FIRST NATIONAL CITY BANK

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REPLY BRIEF OF RESPONDENT-APPELLANT
FIRST NATIONAL CITY BANK

Statement

The action of the court below was a denial of due process of law to First National City Bank ("Citibank").* That statement is solidly supported, in addition to the reasons set out in our main brief, by analysis of the government brief which is so disingenuous and self-contradictory as to amount to a confession of error.

* The denial to Meissner of the right to be heard concerns Citibank only tangentially. The impropriety of the order below is emphasized by the fact that it was entered without the presence in the proceeding of an indispensable party, but we hold no brief for Meissner and leave to his attorneys the exposition of such rights as he may have.

ARGUMENT

I.

The proceeding below was unauthorized.

Neither statute law nor the Federal Rules of Civil Procedure contemplate, nor does decisional law condone, a summary proceeding against an innocent third party in the circumstances of this case.* The government's brief makes no reference to the decisions and authorities cited at pages 10-13 of our main brief, other than a veiled concession (Government brief, pages 8-9) that the proceedings below were directly contrary to well-established legal principles, as recognized by Professor Moore, and upheld by the Supreme Court of the United States. Without citing any supportive authority, the government argues that, inasmuch as the Internal Revenue Service ("IRS") "seeks limited relief merely to learn of the contents of a safe deposit box, but does not seek the adjudication of property rights or tax liability in a civil action, the federal courts in their discretion may grant such limited relief in summary proceedings" (Government brief, p. 9).

But the IRS concedes that here it sought to do more than "merely to learn of the contents" of the box. The IRS position is that "[a]s part of its civil tax collection efforts pursuant to the jeopardy assessment . . . , the I.R.S. on April 10, 1974 levied upon the contents" (Government brief, p. 5), that the levy was a taking of property sufficient to bring the contents within the government's possession (Government brief, p. 14), and constituted a self-executing distraint (Government brief, p. 17); that Citibank must "honor the levy", and that the IRS pro-

* See Citibank brief, pages 3-6, 10-14.

poses to press in this or another proceeding to reduce the contents of the box to physical possession.

There is simply no doubt that what the IRS sought to do, and still seeks to do, is to override Citibank's contract with its lessee-box holder (which Citibank does not oppose if due process is followed) and to obtain possession of the contents of the box, as well as information about the contents. Neither can there be any doubt that the procedure followed by the IRS is seriously deficient even though it "merely violated a procedural rule" (Government brief, p. 12).

II.

"Mere violation of a procedural rule" should not be approved by this Court.

In the circumstances of this case, the combined effect of an unauthorized "break-in" while the court refused to hear the party most concerned, goes far beyond a "mere" violation of a procedural rule. Rules, procedural or substantive, laid down by the legislative and judicial branches of government, must be observed by the executive branch. In a government of the people, there cannot be one law for the government and another for the people.

No credence can be given to the IRS argument that its flagrant disregard of the requirements of due process was justified by a paramount need to protect the revenues.

The notice of levy was served on Citibank on or about April 10, 1974 and the safe deposit box was forthwith sealed. There was no possibility that the contents could be removed. Thereafter, the IRS waited six months, until October 4, 1974, to take action with respect to the contents of the box. Had it pursued the prescribed course, by commencing a plenary action to which Meissner was a party (and if, as it asserts, Meissner had no valid defense in fact or law), an appropriate judgment could have been

entered by the end of May. Indeed, had the IRS commenced such an action on October 4, 1974, judgment could have been entered prior to December 31, 1974, when Judge MacMahon filed his opinion, and certainly before January 28, 1975, the date of filing the order from which this appeal is taken.

In like manner, there is no showing of any paramount and pressing national interest that would justify the District Court's refusal to deny Meissner the right to intervene, thus depriving Citibank of the protection of an order made and entered in a proceeding in which all necessary and proper parties had been given notice and an opportunity to be heard.

It is difficult indeed to reconcile the presumed good faith of the IRS with its cavalier disregard of the Federal Rules of Civil Procedure, its refusal to give Meissner his day in court and its shrugging off Citibank's claim of its right to the protection of a valid order. This was followed, moreover, by an extraordinary attempt to preclude review by this Court.

It appears that an administrative determination has been made to establish new procedures for the convenience of the IRS. Indeed, attached hereto, as Addendum A, is a letter from the Chief of the Tax Unit in the United States Attorney's office to Chemical Bank, furnished to us by counsel for Chemical Bank and submitted with their permission to the panel of this Court (Van Graafeiland, Moore and Friendly, J.J) who denied the IRS motion to dismiss the appeal, on the grounds (repeated at Government brief, pp. 25-29) that Citibank's appeal is (a) moot and (b) premature.

The matter is of serious concern to banks and safe deposit companies as well as to taxpayers generally. The procedure envisaged in the Tax Unit's letter to Chemical Bank unmistakably contemplates a by-pass of the judicial process under the plain threat of monetary liability if the

fiat of the IRS is not "satisfactorily honored". The Tax Unit's proposal so far departs from accepted (or acceptable) practice as to require corrective action by federal courts of superior jurisdiction. The mischief of the order appealed from is already plainly evident.

CONCLUSION

The petition and order to show cause should be dismissed; the inventory filed with the court destroyed, and the government relegated to a plenary action against the proper parties, if it so chooses.

Dated: New York, New York
August 14, 1975

Respectfully submitted,

SHEARMAN & STERLING
*Attorneys for Respondent-
Appellant*

HENRY HARFIELD
MATTHEW C. GRUSKIN
Of Counsel



ADDENDUM A

COPIES SENT TO
FEDERAL ATTORNEY
AND WIFE TO
STRAUS AND STRAUS

DPL:lm

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE ANNEX
FORTY SQUARE -- One St. Andrews Plaza
NEW YORK, N. Y. 10007

April 16, 1975

The Chemical Bank
277 Park Avenue
New York, New York

Re: Safe Deposit Box No. ~~1234~~ Leased to
~~XXXXXXXXXX~~ Subject to an Internal
Revenue Service Notice of Levy

Dear Sirs:

The Attorney General of the United States and the Chief Counsel of the Internal Revenue Service have requested us to take such action as is necessary to effect compliance with an Internal Revenue Service Notice of Levy (copy enclosed) served upon Chemical Bank on November 14, 1973 in respect of the then outstanding tax liability of ~~XXXXXXXXXX~~. We understand that Mr. ~~XXXX~~ uses the Chemical Bank's safe deposit box number ~~1234~~. We further understand that Chemical Bank has not honored the Notice of Levy as to the safe deposit box.

The purpose of this letter is to ascertain whether Chemical Bank will voluntarily comply with the Notice of Levy. If you so agree, we suggest (1) that a mutually agreeable date be fixed for the forcible entry of the safe deposit box (the expenses of which will be paid by the United States) in the presence of appropriate Chemical Bank and Internal Revenue Service officials, (2) that upon such entry the contents of the safe deposit box be delivered by Chemical Bank to the Internal Revenue Service, and (3) that depending upon the nature of the contents of the safe deposit box, appropriate releases be given to Chemical Bank reflecting compliance with the Notice of Levy.

The Chemical Bank

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April 16, 1975

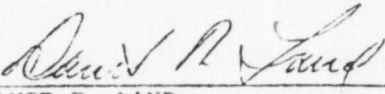
As the Chemical Bank is no doubt aware, upon the petition of the United States, the federal district courts may direct the opening of the safe deposit box for the purpose of ascertaining the contents thereof. United States v. First National City Bank and Chemical Bank New York Trust Company, 75-1 U.S.T.C. ¶ 9168 (S.D.N.Y. 12/31/74). In view of the fact that 26 U.S.C. § 6332(d) provides that a person honoring a tax levy shall be relieved of any liability to the delinquent taxpayer and in view of the above case, we believe that resort to litigation is an unnecessary burden on the United States, the courts, and Chemical Bank. Also, in view of 26 U.S.C. § 6332(c) and United States v. Sterling National Bank and Trust Company, 494 F.2d 919 (2nd Cir. 1974), the Chemical Bank may be exposed to a monetary liability to the United States if the Notice of Levy is not satisfactorily honored prior to litigation.

We ask that you give this matter your consideration and contact us within three weeks as to your position.

Very truly yours,

PAUL J. CURRAN
United States Attorney

By:


DAVID P. LAND
Assistant United States Attorney
Chief, Tax Unit
Telephone: (212) 791-0054

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State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON

being duly sworn, deposes

and says that he is over the age of 18 years. That on the **14th**
day of **August**, 1975, he served **two** copies of the

Reply Brief of Respondent-Appellant on
Neal Hurwitz, Esq. the attorney for the **Proposed Intervenor-Appellant**

by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney at
No. **745 Fifth Avenue, New York** () N. Y.,
that being the address designated by him for that purpose upon
the preceding papers in this action.

David F. Wilson

Sworn to before me this

14th day of **August**, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976